86-476

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Petitioner,

v.

STATEN ISLAND RAILROAD CORPORATION;
STATEN ISLAND RAILWAY CORPORATION;
INTERSTATE COMMERCE COMMISSION; and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Date: September 23, 1986

QUESTIONS PRESENTED

1. Do 28 U.S.C. §§ 2321(a) and 2342 preclude a district court, acting under 28 U.S.C. § 1337, from enforcing the commands of the Railway Labor Act where the relief granted to rail labor in enforcing those commands might act either to delay rail carriers from implementing a sale transaction authorized by an order of the Interstate Commerce Commission or to modify the terms of that sale?

2. May a federal court, in the exercise of its discretion in enforcing the bargaining and status quo commands of the Railway Labor Act, direct a rail carrier which has transferred its operations pursuant to an order of the Interstate Commerce Commission to continue to pay its employees while that carrier complies with the Act's major dispute resolution processes?

PARTIES TO THE PROCEEDING

Respondents in this case are the Staten Island Railroad Corporation and the Staten Island Railway Corporation which were appellees below. The Interstate Commerce Commission and the United States of America intervened in support of appellees before the court of appeals and are listed as respondents before this Court.

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INTERSTATE COMMERCE COMMISSION; and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Railway Labor Executives' Association [hereinafter, "RLEA"] [1] respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review and, upon review, to reverse the decision by that court in *RLEA v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986).

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[1] Petitioner RLEA is an unincorporated, voluntary association of the chief executive officers of nineteen standard labor organizations which collectively represent virtually all organized railroad employees in this country, including such employees on respondent Staten Island Railroad Company [hereinafter, "SIRC"]. A list of RLEA's member organizations is attached hereto as Appendix E; those organizations which represent SIRC employees are marked by an asterisk.

OPINIONS BELOW

The opinion by the court of appeals, which was issued on May 22, 1986, is reported at 792 F.2d 7 and is reproduced herein as Appendix A. That decision affirmed an order of the United States District Court for the Eastern District of New York which was entered on May 21, 1985, dismissing RLEA's complaint for a declaratory judgment and injunctive relief to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.* The district court's decision has not been reported officially, but is reproduced herein as Appendix B.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1986, and on August 12, 1986, Justice Thurgood Marshall granted RLEA an extension until September 19, 1986, in which to file this petition; on September 22, Justice Marshall granted RLEA a further extension until September 26, 1986. Sup. Ct. No. A-85. This petition was filed by September 26, 1986, and is therefore timely. 28 U.S.C. § 2101(c). This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the impact of an order of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] under Section 10905 of the Interstate Commerce Act, 49 U.S.C. § 10905, upon the ability of rail labor to enforce the commands of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, in particular, those obligations imposed upon carriers by Sections 2, First and Seventh, Section 5, First and Section 6 of that Act (45 U.S.C. §§ 152, First and Seventh, 155, First, and 156). The

relevant portions of the Interstate Commerce Act and the Railway Labor Act are reproduced as Appendix D. 28 U.S.C. §§ 2321(a) and 2342 are also relevant to this case and they, too, are reproduced in Appendix D.

STATEMENT OF THE CASE

For the past several years, rail labor and rail management have been engaged in a constantly erupting dispute over the affect of orders of the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] on rail labor's contractual and Railway Labor Act rights, with rail management taking the position that ICC orders supersede the employees' contractual and statutory rights. Recently, several cases presenting various aspects of this dispute have reached this Court and this Court has granted two petitions for a writ of certiorari to review a decision by the United States Court of Appeals for the District of Columbia Circuit in *Brotherhood of Locomotive Engineers v. ICC,* 761 F.2d 714 (D.C. Cir. 1985), *cert. granted,* Sup. Ct. Nos. 85-792 and 85-793, which deals with the Commission's authority in this area. Other cases are pending before this Court for petitions for writs of certiorari in *United Transportation Union v. Missouri Pacific R.R.,* Sup. Ct. No. 85-1054 and *Brotherhood of Locomotive Engineers v. Boston and Maine Corp.,* Sup. Ct. No. 85-2153, and cross-petitions in *United Transportation Union v. ICC,* Sup. Ct. No. 85-983 and *Brotherhood of Locomotive Engineers v. ICC,* Sup. Ct. No. 85-997. This case presents another and, petitioner RLEA respectfully submits, crucial aspect of this newly discovered conflict between the Railway Labor Act, 45 U.S.C. § 151, *et seq.,* and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.,* because in this case the court of appeals ruled that federal courts could not enforce Railway Labor Act rights where the enforcement of such rights might impinge upon

a carrier's implementation of the authority conferred upon it by an ICC order.

In this case, rail labor asked respondent SIRC to negotiate contractual provisions to protect employee interests if the SIRC decided to sell or discontinue its operations. Joint Appendix in the court of appeals [hereinafter, "J.A."] at 71. Respondent refused because, in its opinion, the ICC had exclusive and plenary jurisdiction over such matters. J.A. at 46. When respondent SIRC sold its operations to a newly-formed railroad pursuant to an order of the ICC under 49 U.S.C. § 10905 (*see,* Appendix C, hereto), petitioner RLEA filed a suit in the district court to enforce both rail labor's right to bargain and the Railway Labor Act's status quo requirement while that bargaining continued. J.A. at 3. Rail labor's efforts, however, were unsuccessful, for the court of appeals concluded that RLEA's suit must be dismissed because the district court "could not formulate a meaningful remedy without impinging upon the ICC's order approving the sale in question . . . ." Appendix A at 7a. By concluding that rail labor could not enforce the bargaining and status quo requirements of the Railway Labor Act, the court of appeals has deprived rail labor of important statutory protections without giving any consideration to the impact which such a deprivation of rights would have on the Railway Labor Act. Moreover, the appellate court has deprived rail labor of the protections of that labor statute for reasons which conflict with this Court's decision in *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960), and with decisions by the Fifth Circuit in *United Industrial Workers v. Board of Trustees of Galveston Wharves,* 351 F.2d 183 (5th Cir. 1965), and 368 F.2d 412 (5th Cir. 1966), and 400 F.2d 320 (5th Cir. 1968), *cert. denied,* 395 U.S. 905 (1969) [hereinafter, "*Galveston Wharves* Trilogy"].

A. Facts

Prior to its cessation of operations in April 1985, respondent SIRC operated a 31.16 mile rail system, primarily on Staten Island, New York. Respondent owned 16.68 miles of that system and had the right to operate over an additional 14.48 miles of track on Staten Island which were owned by the Staten Island Rapid Transit Operating Authority. Appendix C at 1c. To perform its operations, respondent SIRC employed 31 employees, 30 of whom were represented by RLEA member organizations. J.A. at 92-93. Respondent SIRC is wholly owned by subsidiaries of the CSX Corporation, a large railroad holding corporation which controls the Chessie System, Inc. and the Seaboard system which, together, operate over 18,000 miles of track in the eastern portion of this Country and into Canada. *See, CSX-Control,* 363 I.C.C. 518 (1980), *aff'd sub nom. Brotherhood of Maintenance of Way Employes v. ICC,* 698 F.2d 315 (7th Cir. 1983).

In 1984, respondent SIRC decided to discontinue its operations and notified various local government authorities that it intended to abandon its operations and sell its lines and operations to the Delaware Otsego Corporation's system. Joint Appendix in 2d Cir. Nos. 85-4093 and 85-4107 [hereinafter, "ICC case J.A."] at 61.[2] The Delaware Otsego Corporation, like CSX, is a holding company which operates a rail system, but unlike CSX, operates a "small regional rail system." ICC case J.A. at 92-93. Several railroads make up the Delaware Otsego system, including, as relevant here, the New York, Susquehanna & Western Railroad [hereinafter, "NYS&W"].

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[2] RLEA also challenged the validity of the ICC orders which led to the transfer of operations in this case. That review proceeding was heard by the Second Circuit in conjunction with this case, but under the separate dockets referred to in this text. *RLEA v. United States,* 791 F.2d 994 (2d Cir. 1986). RLEA is not seeking a writ of certiorari in connection with that review proceeding.

On December 24, 1984, SIRC filed an application with the Commission for authority under 49 U.S.C. § 10903 to abandon its tracks and to discontinue its trackage rights operations. Petitioner RLEA opposed that application, but requested that, if the Commission approved SIRC's application, the agency impose a fair arrangement to protect employees who would be affected by the abandonment and discontinuance.

Several days before that application was filed, one of RLEA's member organizations, the International Brotherhood of Electrical Workers, served a notice on SIRC under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, informing that carrier that the labor organization wished to negotiate an agreement which would provide certain monetary, procedural and contractual protections for its members in the event SIRC decided to abandon, sell or transfer its operations.[3] J.A. at 39. Three of the eight other RLEA member organizations which represent SIRC employees subsequently served identical notices. J.A. at 94-95. Respondent SIRC, however, refused to negotiate because it believed that rail labor's requests to negotiate were improper for several reasons (J.A. at 113-14), but most notably because the question of the proper protection for employees affected by an abandonment or sale was within the exclusive and plenary jurisdiction of the ICC. J.A. at 46.

While the parties were disputing the validity of the Section 6 notices, the ICC issued a decision on February 7, 1985, authorizing the abandonment and discontinuance, but upon the condition that SIRC agree to provide to affected employees the employee protections promulgated

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[3] Labor requested that SIRC agree to give six (6) months advance notice of any sale, transfer or abandonment; agree to provide employee protections comparable to those imposed by the ICC in abandonment or consolidation cases; and agree to require any purchaser or transferee to hire SIRC employees and assume applicable collective bargaining agreements. J.A. at 41-42.

in *Oregon Short Line R.R.—Abandonment,* 360 I.C.C. 91 (1979).[4] ICC case J.A. at 67. Several days thereafter, the NYS&W submitted an offer to purchase SIRC's lines and trackage rights pursuant to 49 U.S.C. § 10905. *Id.* at 69. The ICC issued a notice on February 22, 1986, postponing the effectiveness of the abandonment authority for the tracks owned by SIRC. However, the Commission concluded that Section 10905 did not authorize an offer to purchase trackage rights, and it did not postpone the effectiveness of that portion of its abandonment certificate. *Id.* at 72. SIRC responded to that notice by withdrawing its application to discontinue the trackage rights operations (*Id.* at 73), and on February 26, 1985, the Delaware Otsego Corporation, NYS&W and a newly-formed subsidiary, respondent Staten Island Railway Corporation [hereinafter, "SIRY"], filed an application under 49 U.S.C. § 10505 for an exemption from the requirements of 49 U.S.C. § 10901 to enable SIRY to acquire and to operate SIRC's trackage rights. *Id.* at 85. That exemption was granted by a decision served on April 12, 1985. *Id.* at 96.[5] In the meantime, SIRC and NYS&W informed the ICC that they had reached a sale agreement under 49 U.S.C. § 10905 and on April 24, 1985, the Commission served a decision authorizing SIRY to acquire SIRC's tracks and dismissing SIRC's abandonment application "effective on consummation of the sale." Appendix C at 2c. That sale was consummated on April 24, 1985 and "[e]ffective with the close of business on April 24, 1985, all SIRC jobs were abolished . . . ." J.A. at 96. The ICC did not impose any form of employee protection on either

[4] The *Oregon Short Line* conditions are routinely imposed by the ICC in the abandonment case and provide certain monetary and procedural protections, including advance notice of the transaction and a pay guarantee for up to six years after an employee is affected.

[5] RLEA asked the ICC to reconsider that decision and then asked the Second Circuit to set the ICC's decision aside. 2d Cir. No. 85-4107. The court of appeals, however, affirmed the ICC's decision. *RLEA v. United States, supra,* note 2.

the acquisition of trackage rights or the sale under Section 10905.[6]

B. District Court Proceedings

Petitioner RLEA filed a complaint with the United States District Court for the Eastern District of New York on April 25, 1985, against respondents SIRC and SIRY seeking a declaratory judgment that respondent SIRC had violated Sections 2, First and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, First, and 156, by refusing to negotiate with rail labor over the Section 6 notices and the changes which a sale, lease or other transfer of its line would require in existing collective bargaining agreements. J.A. at 13. Petitioner further sought by its suit injunctive relief requiring respondent SIRC to negotiate over the pending Section 6 notices and over the changes caused by a sale, and requiring respondents SIRC and SIRY both to preserve the status quo which existed prior to the sale and to make the employees whole. *Id.*

Petitioner's request for an interlocutory injunction was heard along with respondent SIRC's motion to dismiss for lack of jurisdiction, and on May 21, 1985, the district court issued a decision dismissing RLEA's complaint for lack of jurisdiction. App. B. According to the district court, petitioner's complaint was in reality a collateral attack on the ICC's sale order which could be reviewed only by the court of appeals under 28 U.S.C. §§ 2321(a) and 2341, *et seq.* After noting that RLEA's complaint sought both "a bargaining order and a preservation of the pre-sale status quo" (App. B at 8b), the district court stated that such relief would require SIRC to resume railroad operations and to return the employees to active employment. *Id.* That relief, the court opined,

[6] RLEA sought review of the § 10905 sale order in 2d Cir. No. 85-4093, but that petition was unsuccessful. *RLEA v. United States, supra,* note 2.

could not be granted without reversing the ICC's sale order. *Id.* Moreover, "[s]imply to order SIRC to continue paying the employees without furnishing rail services is not authorized under the RLA [*i.e.*, Railway Labor Act] because the RLA's purpose is to provide for maintenance of the status quo only to ensure the continued furnishing of railroad services." *Id.* Since, in its opinion, it could not structure relief for petitioner "without in practical terms altering the ICC order" (App. B at 9b), the court concluded that RLEA's complaint was an impermissible collateral attack on the ICC's order over which the court did not have jurisdiction. *Id.* at 9b, 11b. It accordingly ordered that RLEA's complaint be dismissed for lack of jurisdiction. App. B at 11b.

On June 7, 1985, petitioner RLEA filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1291.

C. Court of Appeals' Decision

On May 22, 1986, the court of appeals issued its decision affirming the judgment of the district court, but modifying that judgment to declare that the dismissal was not for lack of subject matter jurisdiction, but rather, was because RLEA's complaint failed to state a claim upon which relief could be granted. App. A at 9a. According to the court of appeals, the Railway Labor Act "specifies that a rail carrier has a duty to abide by negotiated collective bargaining agreements[,]" and the Act requires the carrier to comply with its bargaining procedures to resolve disputes over the formation of, or changes to, collective bargaining agreements. App. A at 7a. "When a carrier violates such procedures, it is clear that a district court generally has jurisdiction to enjoin that carrier from further violations." *Id.* Consequently, the court of appeals concluded, the district court had jurisdiction over RLEA's complaint. *Id.*

However, the court of appeals then examined the relationship between RLEA's complaint and the Commission's order and concluded that since the court "could not formulate a meaningful remedy without impinging upon the ICC's order approving the sale in question, . . . RLEA's claims should be dismissed under Fed R. Civ. P. 12(b)(6), for failure to state a claim upon which relief may be granted." App. A at 7a. In addressing the remedy issues, the court proceeded on the assumption that because 28 U.S.C. §§ 2321 and 2342 gave the courts of appeals exclusive jurisdiction to enjoin, suspend or set aside ICC orders, any remedy given by a district court "may not act to modify or rescind the ICC's order concerning the sale." *Id.* Building upon that hypothesis, the appellate court stated that the lower court could not have required SIRC to continue operating its line without rescinding or modifying the ICC's sale order because the ICC's order required SIRC to go forward with the sale.[7] *Id.* at 8a. Once the sale was consummated, the court stated: "SIRC necessarily relinquished all authority to operate a rail system under the Interstate Commerce Act. For the district court to have reversed this process by enjoining SIRC to continue its rail service would have conflicted directly with the ICC's mandate." *Id.*

RLEA's alternative argument, that the district court could have enforced the status quo without upsetting the sale by directing SIRC to maintain the employment status of its employees during the Section 6 negotiations, was also rejected. App. A at 9a. That argument was rejected for the same reason given by the district court; namely, the

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[7] In its sale order, the ICC paraphrased 49 U.S.C. § 10905(f)(2) stating: "Applicant [*i.e.*, SIRC] must complete the sale so long as the buyer consummates." App. C at 2c. RLEA maintained that the sale authority was permissive because either party could withdraw, SIRY by withdrawing its offer, and SIRC by withdrawing its abandonment application. The court of appeals disagreed, concluding that SIRC was bound to sell if SIRY wished to buy. App. A at 8a n.6 and accompanying text.

Railway Labor Act's purpose is to ensure the continued furnishing of railroad services and, thus, the Act does not authorize the payment of employees who do not furnish rail services. *Id.* Even though RLEA asserted below that this construction of the Railway Labor Act is contrary to the Fifth Circuit's decisions in the *Galveston Wharves* trilogy, *supra,* the appellate court did not address that trilogy in explaining its contrary decision.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been Settled By This Court, But Which Should Be Because, In View Of The Recent Trend Towards Regionalization In The Rail Industry, Rail Labor Must Know Whether It Can Invoke The Aid Of The Federal Courts To Enforce The Railway Labor Act's Bargaining And Status Quo Commands When A Railroad Plans To Sell All Or A Portion Of Its Tracks

Job security has long been an important issue for rail labor and over the years rail employees have obtained substantial protection of their employment status through both collectively bargained agreements and legislation. *See, Order of Railroad Telegraphers v. Chicago & North Western Ry.,* 362 U.S. 330, 337-38 (1960); 49 U.S.C. § 11347; Section 7 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 213-14. As this Court explained in the *Chicago & North Western* case, *supra:* " It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large." 362 U.S. at 338. This case presents an example of rail labor's efforts to achieve by collective bargaining contractural provisions to protect their employment opportunities. However, this case also shows that when rail labor is

denied access to the courts to enforce the Railway Labor Act's bargaining and status quo requirements, the protections which that Act gives to employees, and, thus, to the public, are lost. Petitioner RLEA respectfully submits that the ability of rail labor to enforce the Railway Labor Act when a rail carrier plans to sell or to discontinue its operations, purportedly pursuant to an ICC order, presents an issue which is crucial to the entire rail industry today; it is too important of an issue to be resolved by the decision below, for that decision, RLEA respectfully submits, conflicts with the reasoning of this Court in *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra;* does not even purport to reconcile the interests at stake in the two statutory schemes at issue; and conflicts with the *Galveston Wharves* trilogy of the Fifth Circuit.

This case does not present an isolated issue which is unlikely ever to arise again; rather, sales of existing rail lines will be occurring at an accelerated rate over the next decade. *Hearings Before Subcommittee on Surface Transportation of Senate Committee on Commerce, Science, and Transportation on Establishment of New Short Line And Regional Railroads,* 99th Cong., 2d Sess. [hereinafter, "*Senate Hearings*"], Transcript at 4 (July 25, 1986) (Testimony of Hon. John Riley, Administrator, Federal Railroad Administration). Since at least the enactment of the Transportation Act of 1920, 41 Stat. 456, Congress has encouraged railroads to consolidate their systems, and in the past twenty years that concentration of rail systems has created several gigantic rail systems such as the 18,000 mile CSX rail system. *See,* page 5, *supra.* Along with that concentration has come the concept of "redundancy" as the large railroads identify and discard rail lines which they believe are no longer essential to their systems. In most cases, however, those redundant lines are still essen-

tial to the shippers which are located on or near those lines, and can be economically viable and, indeed, profitable on a stand-alone basis. *Senate Hearings* at 5-6 (Testimony of John Riley).

Between 1950 and the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, approximately seventy-five (75) small railroads were created to service lines discarded by existing carriers. *Senate Hearings* at 6. With the passage of the Staggers Rail Act, there has been an explosion in the number of such newly-formed railroads, for in the past six years 133 short line carriers, including the new "regional carriers," have been created. *Id.* By July 1986, there were approximately 393 independent carriers in this country and they employed approximately 80,000 employees, or approximately 23% of the 350,000 active rail employees today. *Id.* at 1, 6 (Statement of Sen. Packwood; testimony of John Riley). These new carriers are not all short line railroads; rather, a recent trend is towards regional lines such as the newly-formed 980-mile Dakota, Minnesota & Eastern Railroad, which encompass hundreds of miles and employ hundreds of employees. *Id.* at 17, 139 (Statement of Sen. Pressler; testimony of O.M. Berge). This trend towards short lines and regional carriers, according to the Administration, "is certain to continue and accelerate in the rest of this century." *Id.* at 7 (Testimony of John Riley). Indeed, many of the large railroads, such as CSX, are studying their lines to identify possible candidates for "regionalization" and "are about to implement major system rationalization programs." *Id.* at 7, 9-10.

An important aspect of the recent trend towards regionalization and, according to the Federal Railroad Administration, possibly the reason for the major railroads' willingness to participate in this process, is that the ICC has announced that it will not impose employee protective provisions on such transfers. *Senate Hearings*

at 9-10, 28; *Ex Parte* 392 (Sub-No. 1), *Class Exemption for the Acquisition & Operation of Rail Lines Under 49 U.S.C. 10901, pet. for review pending,* D.C. Cir. Nos. 86-1107 and 86-1131. Since 49 U.S.C. § 10903(b)(2) requires the Commission to impose a fair arrangement to protect employee interests whenever that agency authorizes an abandonment or discontinuance of operations, the ability to transfer a redundant line "free" of any statutory obligation to employees is a strong incentive "to regionalize" rather than to abandon.

Rail labor has been facing a drastically declining job market for the past forty years, and that process is accelerating with the increase of short and regional lines. *Senate Hearings* at 137 (Testimony of O.M. Berge). However, since the Depression, it has been recognized that it is not in the public's interest for the public to benefit at the expense of rail employees (*e.g.,* § 7(b) of the Emergency Railroad Transportation Act of 1933, *supra; ICC v. RLEA,* 315 U.S. 373, 377-78 (1942)), and it was partly for that reason that this Court has recognized and protected rail labor's right to require our nation's railroads to negotiate about matters that effect their job security. *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra,* 362 U.S. at 337-38. Nevertheless, today the ICC has ignored the rationale underlying statutorily required employee protection, and rail labor must rely upon the collective bargaining process to achieve what it believes is the proper protection for its members. Unfortunately, the lower courts in this case, by classifying rail labor's complaint as being a collateral attack on the ICC's sale order, have barred rail labor from invoking the jurisdiction of the federal courts to enforce the right to negotiate which Congress has protected in the Railway Labor Act. The Second Circuit's reasoning in this case is now being relied upon by other federal courts to prevent rail labor from interfering with the regionalization process

by asking federal courts to enforce both the duty to bargain over such sales and the obligation to preserve the status quo while that bargaining continues. *Burlington Northern R.R. v. Brotherhood of Locomotive Engineers,* W.D. Mo. Civil Action No. 84-5013 CV-SWO, Rail labor's TRO request denied August 29, 1986; *RLEA v. Chicago & Northwestern Transportation Co.,* D. Minn. Civil Action No. 3-86-738, TRO denied August 27, 1986.

The issue of whether a suit to enforce Railway Labor Act commands in a case involving an ICC authorized sale is an impermissible collateral attack on that ICC order, is an important question of federal law which has not been resolved by this Court, but, petitioner RLEA respectfully submits, should be resolved by this Court. As shown by the next reason for granting this writ, the lower courts did not attempt to balance the important federal interests which are protected by the Railway Labor Act with the policies of the Interstate Commerce Act. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 172-73 (1962). Nor did the lower courts consider the rationale underlying this Court's decision in the *Order of Railroad Telegraphers* case, or the conclusion which was reached by the Fifth Circuit in the *Galveston Wharves* trilogy as to possible remedies available to enforce the important Railway Labor Act interests at stake. *See generally, Chicago & North Western Ry. v. United Transportation Union,* 402 U.S. 570, 577 (1971) (bargaining obligation of Railway Labor is "enforceable by whatever appropriate means might be developed on a case-by-case basis"). Rail labor's ability to seek judicial enforcement of the Railway Labor Act commands is too important to the stability of the rail industry today to be resolved by a decision, such as the one at bar, which does not address any of the relevant considerations. RLEA, therefore, respectfully requests that this Court address this issue.

II. The Decision Of The Court Of Appeals Conflicts With This Court's Analysis Of The Railway Labor Act's Bargaining Obligations In The *Order Of Railroad Telegraphers* Case, And Conflicts With The Decisons By The Fifth Circuit In The Galveston Wharves Trilogy

A. Assuming that 28 U.S.C. §§ 2321(a) and 2342 probihit a federal district court from granting rail labor any form of relief which would delay or modify the implementation of the ICC's sale order, the court of appeals concluded that the district court could not enforce the Railway Labor Act's bargaining and status quo commands by requiring respondents SIRC and SIRY to restore the status quo which existed before the two carriers rushed to consummate the sale, and by requiring SIRC to bargain with its employees before it reconsummated that sale. According to the court of appeals, such relief would have impermissibly modified and rescinded the ICC's sale order. App. A at 8a-9a. That ruling, RLEA respectfully submits, conflicts with the reasoning of this Court in *Order of Railroad Telegraphers v. Chicago & North Western Ry., supra,* because it made no effort to read the two statutory schemes together so that the "policies of the Interstate Commerce Act and the labor act [were] . . . accommodated, one to the other" (*Burlington Truck Lines, Inc. v. United States, supra,* 371 U.S. at 172-73), as this Court did in the *Order of Railroad Telegraphers* case.

This Court has emphasized before that the bargaining obligation of the Railway Labor Act (*i.e.,* 45 U.S.C. § 152, First (duty "to exert every reasonable effort to make and maintain agreements")), is not a mere hortatory statement, but rather, "was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & North Western Ry. v. United Transportation Union, supra,* 402 U.S. at 577. That requirement, which is in fact the

"heart" of the Act upon which the other obligations are based (*Id.* at 574), is buttressed by the Act's status quo requirement (*i.e.*, 45 U.S.C. §§ 152, Seventh, 155, First, 156 and 160) which together "form an integrated, harmonious scheme for preserving the status quo from the beginning of the major dispute through the [Act's] final 30-day 'cooling-off' period." *Detroit & Toledo Shore Line R.R. v. United Transportation Union,* 396 U.S. 142, 152 (1969). As this Court explained in the *Order of Railroad Telegraphers* case, rail labor's efforts to bargain over job security does not conflict with the Interstate Commerce Act, but rather, is consistent with that statutory scheme, for the "Railway Labor Act and the Interstate Commerce Act recognize that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." 362 U.S. at 336-37. Moreover, as this Court stated in the *Telegraphers* case: "There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs." 362 U.S. at 340 (footnote omitted).

RLEA acknowledges that *Telegraphers* is not squarely on point, because the Court noted that there was in that case no order of a state agency comparable to the ICC [8] which conflicted with union's bargaining demands. Here, however, the lower courts did find such a conflict, and because they viewed 28 U.S.C. §§ 2321(a) and 2342 as precluding any relief which would conflict with the ICC's order, they denied rail labor the right to enforce commands which this Court has noted are central to the Railway Labor Act's statutory scheme. *E.g., Detroit &*

[8] It should be noted that in view of the preemptive effect of the Railway Labor Act on state regulations, the issue undecided by this Court in the *Order of Railroad Telegraphers* was not identical to a conflict between the Railway Labor Act and an ICC order which presents a conflict of laws question.

Toledo Shore Line R.R. v. United Transportation Union, supra, 396 U.S. at 150. 28 U.S.C. §§ 2321(a) and 2342, however, preclude relief which would conflict with an order of the ICC only if the federal courts do not have jurisdiction to consider rail labor's complaint, for Section 2321(a) provides that: "Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, [an] . . . order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title [*i.e.,* 28 U.S.C. § 2341, *et seq.*]." But, as the court of appeals concluded in this case, federal courts do have jurisdiction to enforce the Railway Labor Act. 28 U.S.C. § 1337; App. A. at 7a.

Consequently, this case presents a question left open by *Telegraphers* and should have been resolved by the lower courts by considering the importance of the Railway Labor Act interests at stake in balance with those interests which are protected by the Interstate Commerce Act. Since the lower courts made no effort to balance the two statutory schemes, RLEA urges this Court to review this case to perform that essential balance.

B. RLEA also argued below that even if it were assumed that the district court was precluded from "unscrambling" the sale (an assumption which RLEA submits is incorrect), the court could still have fashioned a form of relief which would have enforced the Railway Labor Act's bargaining and status quo obligations by preserving the employees' employment status while the parties complied with the Act's major dispute resolution processes. That argument was rejected by the court of appeals because it believed that the Act's status quo requirement did not authorize payment of employees where there were no actual services to perform. RLEA respectfully submits that this conclusion rewards an employer for violating the Act and is in direct conflict with a

contrary ruling by the Fifth Circuit in the *Galveston Wharves* trilogy. *See,* page 4, *supra.*

To support its alternative argument to the courts below, RLEA relied upon the *Galveston Wharves* trilogy which addressed a comparable dispute. In that series of cases, the Fifth Circuit concluded that the appropriate sanction in a case where a carrier had improperly ceased operations without first complying with the Act's bargaining processes, in a situation in which the district court concluded that the transfer of operations should not be set aside, was to direct both that the carrier bargain and that the employees be reinstated with back pay during the bargaining. 400 F.2d at 323. As the Fifth Circuit explained in its second decision in that case:

> There must be an impact on the duty to bargain to prevent the employer from getting a windfall for having violated the Act, while protecting the employees' benefits against the lapse of time. While we did not [in the initial decision] foreclose the possiblity that the lease might have to be unscrambled—a literal restoration of the status quo—we felt that something less could be substituted, so long as the employees were put substantially in the same position as if Galveston Wharves had complied with the Act.

368 F.2d at 413 (footnote omitted). Here, the court of appeals ignored that holding and concluded that the Railway Labor Act did not authorize the type of relief which the Fifth Circuit held was authorized. In view of this Court's conclusion in *Chicago & North Western Ry. v. United Transportation Union, supra,* 402 U.S. at 577, that the Act's bargaining command is to be enforced "by whatever appropriate means might be developed on a case-by-case basis[,]" petitioner RLEA submits that this Court should resolve this conflict between the circuits on this important issue.

CONCLUSION

For the reasons set forth above, petitioner RLEA respectfully requests that this Court grant the writ as requested herein.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

SECOND CIRCUIT.

No. 336, DOCKET 85-7483.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff-Appellant,

v.

STATEN ISLAND RAILROAD CORPORATION and
STATEN ISLAND RAILWAY CORPORATION,
Defendants-Appellees,

Interstate Commerce Commission and
United States of America,
Intervenors-Appellees.

Argued Dec. 9, 1985.

Decided May 22, 1986.

Before VAN GRAAFEILAND, NEWMAN and MINER, Circuit Judges.

MINER, Circuit Judge:

The Railway Labor Executives' Association ("RLEA") [1] appeals from a judgment of the United States District Court for the Eastern District of New York (Sifton, J.), dismissing for lack of subject matter jurisdiction, Fed.R.Civ.P. 12(b)(1), its complaint under the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-164, arising from the sale of railroad track from the

[1] RLEA is an unincorporated association of the chief executive officers of twenty-one labor unions, representing virtually all railroad employees in the United States.

Staten Island Railroad Corporation ("SIRC") to the Staten Island Railway Corporation ("SIRY") under the abandonment/sale provisions of 49 U.S.C. § 10905. The district court concluded that it could not fashion a remedy for RLEA's claims without impinging upon an order of the Interstate Commerce Commission ("ICC") approving and mandating the sale. Accordingly, because the authority to enjoin or modify an ICC order rests exclusively with this and other circuit courts, 28 U.S.C. §§ 2321, 2342, the district court determined that it lacked jurisdiction over the action. We agree with the district court that dismissal of the complaint was proper but believe that this dismissal was more appropriately accomplished under Fed.R.Civ.P. 12(b)(6). We therefore modify the judgment of the district court to declare that the complaint is dismissed with prejudice under Rule 12(b)(6) and affirm the judgment as modified.

1. BACKGROUND

At the time of the transaction at issue, SIRC, a wholly owned subsidiary of the Maryland and West Virginia Company, operated a rail system consisting of 31.16 miles of track and trackage rights running across Staten Island and into northern New Jersey. In December of 1984, SIRC filed an application to abandon its rail system pursuant to 49 U.S.C. § 10903, claiming loss of profits and poor conditions of the lines as the bases for its decision.[2] Section 10903 provides that a rail carrier may abandon its rail lines "only if the [ICC] finds that the present or future public covenience and necessity require or permit the abandonment or discontinuance." *Id.* § 10903(a). SIRC's application requested that the ICC impose no labor protective conditions on the abandonment, since SIRC was attempting to abandon its entire line and therefore would no longer be in the business of providing rail service.

During the pendency of SIRC's application before the ICC, RLEA became concerned over the potential impact of an

[2] For a more complete discussion of the issues surrounding SIRC's abandonment application, see *Railway Labor Executives' Association v. I.C.C.*, 791 F.2d 994 (2d Cir. 1986).

abandonment upon the rights, guaranteed by current collective bargaining agreements, of SIRC employees whom its member unions represented. Consequently, four member unions of the RLEA served "Section 6 notices" on SIRC, 45 U.S.C. § 156. Section 6 of the RLA governs disagreements between carriers and employees over the formation of, or changes to, a collective bargaining agreement. It requires thirty days notice of proposed changes to a collective bargaining agreement and provides for negotiations between the carrier and union over such changes. *Id.* If no agreement is reached, either party may request mediation from the National Mediation Board, which in turn may suggest that the parties arbitrate the dispute. *Id.* If the parties do not agree to arbitration, a thirty-day cooling-off period is imposed for the parties to resort to various self-help measures. *Id.* Throughout the entire process, the RLA directs the parties to maintain the status quo.

Here, the unions' notices sought to amend their collective bargaining agreements to require SIRC to give them six-months advance notice of any abandonment of SIRC's rail system, and, if such an abandonment were to occur, for SIRC to impose labor protective conditions as set forth in *Oregon Short Line Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1975),[3] upon all employees affected by the abandonment. Alternatively, if SIRC were to sell its lines to another party, the unions requested that SIRC require the purchaser to employ all those SIRC employees affected by the sale, to assume the unions' collective bargaining agreements with SIRC, and to apply labor protective conditions as set forth in *New York Dock Railway v. United States,* 609 F.2d 83 (2d Cir. 1979),[4] to all such employees.

At the same time, RLEA strenuously opposed SIRC's request before the ICC for approval of its application without the imposition of labor protective conditions. In its formal

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[3] *Oregon Short Line* conditions require the carrier, among other things, to pay wages to those employees who lose their jobs because of the abandonment for up to six years from the date of the abandonment.

[4] *New York Dock* conditions are similar to *Oregon Short Line* conditions. *New York Dock* conditions, however, are applied to both parties to the transaction, whereas *Oregon Short Line* conditions are imposed solely upon the abandoning party.

comments to the ICC on the application, RLEA requested that the ICC impose labor protective conditions on SIRC pursuant to 49 U.S.C. § 10903(b)(2), which mandates the imposition of such conditions upon all partial line abandonments. On February 1, 1985, the ICC issued a decision approving the abandonment application and the issuance to SIRC of a certificate of public convenience and necessity. In light of RLEA's comments and the requirements of section 10903(b)(2), however, the ICC imposed on SIRC *Oregon Short Line* conditions.

Within days of the ICC's approval of the application, the New York Susquehanna & Western Railway Corporation ("NYS & W"), on behalf of SIRY, its new subsidiary, made an offer to purchase SIRC's rail system under the provisions of 49 U.S.C. § 10905. Section 10905, entitled "Offers of financial assistance to avoid abandonment and discontinuance," is a "forced sale" provision which attempts to preserve rail service over lines that otherwise would be abandoned. Under section 10905, within ten days of the publication of the ICC's decision on the abandonment, "any person may offer to pay the carrier a subsidy or offer to purchase the line." *Id.* § 10905(c). The effective date of the abandonment certificate simultaneously is stayed pending a determination of the legitimacy of any offers. *Id.* § 10904(c)(4). If within fifteen days after the publication an offeror is determined to be financially responsible and the offer statutorily satisfactory, the ICC is required to "postpone the issuance of a certificate" in order to give the parties an opportunity to negotiate a final sale. *Id.* § 10905(d). If the parties are able to reach an agreement for the sale which ensures continued rail service on the line, "the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance." *Id.* § 10905(e). If, however, the parties are unable to reach an agreement, either party may request that the ICC fix a price for the sale, based upon the fair market value of the line. *Id.* § 10905(f)(1). The ICC's decision then becomes binding on the parties unless the offeror withdraws its offer to purchase the line within ten days of the ICC's decision. *Id.* § 10905(f)(2).

On February 20, 1985, the ICC issued a decision finding NYS & W's offer to be *bona fide* and NYS & W to be financially responsible under section 10905(d).[5] Accordingly, the ICC postponed the issuance of SIRC's abandonment certificate to give SIRC and NYS &W an opportunity to negotiate a sale. In mid-March 1985, SIRC, NYS & W and SIRY informed the ICC that they had reached an agreement for the sale of the track under section 10905 and requested final approval of the sale. The parties further requested that the ICC impose no labor protective conditions. RLEA opposed approval of the sale without the imposition of such conditions, arguing that the requirements of section 10903(b)(2) should be read to apply to the sale at issue.

On April 19, 1985, following the directive of section 10905(e), which requires the ICC to approve a sale and dismiss the application for abandonment of the line once an agreement between the purchasing and selling parties has been reached, the ICC authorized the sale to SIRY. In so doing, it tacitly declined to impose labor protective conditions on the sale, consistent with its prior view that the lack of any specific reference to such conditions within the text of section 10905 foreclosed the ICC from imposing them in such a sale. *Illinois Central Gulf Railroad—Abandonment—in Alexander County, Illinois,* 366 I.C.C. 911 (1983), *aff'd sub nom. Simmons v. I.C.C.* 760 F.2d 126 (7th Cir. 1985), *cert. denied,* ____U.S. ____, 106 S.Ct. 791, 88 L.Ed2d 769 (1986). The ICC decision made no mention of the Section 6 notices or the RLA and noted that SIRC "must complete the sale so long as the buyer consummates. *The Staten Island Railroad Corporation—*

[5] The ICC actually approved only the sale of 16.68 miles of the SIRC system under § 10905. This track represented the portion of the system owned by SIRC itself. The other 14.48 miles of the system was in the form of trackage rights over track owned by the Staten Island Rapid Transit Authority. The sale of the trackage rights under § 10905 was disallowed by the ICC on the ground that trackage rights acquisitions were not an appropriate subject of a § 10905 sale. *The Staten Island Railroad Corporation—Abandonment and Discontinuance of Service—In Richmond County, NY and Union County, NJ,* AB-231 (Feb. 20, 1985). The trackage rights later were sold to SIRY under the provisions of 49 U.S.C. § 10901. *See Railway Labor Executives' Association v. I.C.C.,* 791 F.2d 994 (2d Cir. 1986).

Abandonment and Discontinuance of Service—In Richmond County, NY and Union County, NJ, Docket No. AB-231, at 1 (April 19, 1985) (*"SIRC Abandonment"*).

On the day the ICC served its decision, SIRC and SIRY consummated the sale, ignoring the outstanding Section 6 notices and the procedures governing such notices under the RLA. The next day, RLEA commenced this action, alleging that SIRC's sale of its rail system to SIRY without negotiated labor protective conditions and without adhering to the unions' Section 6 notices constituted a change in the existing rates of pay, rules or working conditions of its employees as embodied in the collective bargaining agreement, in violation of Section 2, First and Section 6 of the RLA, 45 U.S.C. §§ 152 First, 156. In its complaint, RLEA sought declaratory and injunctive relief requiring SIRC and SIRY to negotiate the desired changes to the collective bargaining agreements and to require the carriers to comply with the status quo provisions of Section 6.

The district court dismissed the complaint on the ground that it lacked subject matter jurisdiction over the claims. Fed.R.Civ.P. 12(b)(1). It reasoned that no remedy could be granted to RLEA that would not impinge upon the ICC's order granting SIRC and SIRY approval for the final sale of the rail system. Because exclusive jurisdiction to review ICC orders rests with the federal courts of appeals, 28 U.S.C. §§ 2321, 2342, the court noted that RLEA's claims constituted a collateral attack upon the ICC's order, unreviewable by the district court.

On appeal, RLEA asserts that its intention was not to collaterally attack the ICC order, but rather to force SIRC and SIRY to comply with the RLA and negotiate necessary changes in the collective bargaining agreements. Arguing that the agreements establish rights independent from those protective conditions which the ICC imposes upon carriers, RLEA contends that the injunctive relief requested would not impinge upon the ICC decision. In this regard, RLEA points out that the ICC did not mandate the sale of line in its order, but rather merely approved a potential sale. Once approval was obtained, RLEA asserts, either party could have declined to go forward

with the transaction, either by SIRY withdrawing its offer or by SIRC withdrawing its abandonment application and continuing to operate its line.

II. DISCUSSION

As a threshhold matter, we note that dismissal of RLEA's claims pursuant to Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction, was inappropriate. The RLA specifies that a rail carrier has a duty to abide by negotiated collective bargaining agreements and to settle all disputes arising therefrom within the parameters of that statute. 45 U.S.C. § 152, First. Disagreements relating to the formation of, or changes to, a collective bargaining agreement are deemed "major disputes" within the ambit of Section 6 procedures. *Elgin, Joliet & Eastern Railway Company v. Burley,* 325 U.S. 711, 723, 65 S.Ct. 1282, 1289, 89 L.Ed. 1886 (1945). When a carrier violates such procedures, it is clear that a district court generally has jurisdiction to enjoin that carrier from further violations. *The Detroit and Toledo Shore Line Railroad Company v. United Transportation Union,* 396 U.S. 142, 90 S.Ct. 294, 24 L.Ed.2d 325 (1969). Consequently, we find the district court's classification of its basis for dismissal inconsistent with the provisions of the RLA.

This, however, does not end the inquiry. Once jurisdiction over RLEA's claims is found to exist, the issue then becomes what remedy could the district court provide, assuming RLEA's success on the merits. Such a remedy, regardless of the jurisdictional issue, may not act to modify or rescind the ICC's order concerning the sale. See 28 U.S.C. §§ 2321, 2342. Because we agree with the district court that it could not formulate a meaningful remedy without impinging upon the ICC's order approving the sale in question, we hold that RLEA's claims should be dismissed under Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief may be granted.

An appellate court may affirm a district court's decision on any basis for which a sufficient record exists to permit findings of fact and conclusions of law. *Heimbach v. Chu,* 744 F.2d 11, 13 (2d Cir. 1984), *cert. denied,* ____U.S. ____, 105 S.Ct. 1842, 85 L.Ed.2d 141 (1985). Here, RLEA requested declaratory and injunctive relief to preserve the status quo pending negotiations between SIRC and the unions over the collective bargaining agreements. In effect, RLEA sought to stay the consummation of the sale to SIRY pending such negotiations and to require SIRC to continue operation of its line with its present employees.

Under no circumstances could this request be granted without recission or modification of the ICC's order. That order provided that SIRY was "authorized to acquire" the rail line and that SIRC's application to abandon its line would be "dismissed effective on consummation of the sale." *SIRC Abandonment,* at 2. It further provided that SIRC "*must* complete the sale so long as [SIRY] consummates." *Id.* at 1 (emphasis added). Accordingly, the order, as we read it, required SIRC to go forward with the sale, assuming SIRY's continued willingness. Once the parties consummated the sale, which was done prior to the commencement of this action, SIRC necessarily relinquished all authority to operate a rail system under the Interstate Commerce Act. For the district court to have reversed this process by enjoining SIRC to continue its rail service would have conflicted directly with the ICC's mandate.

We reject RLEA's assertion that the ICC order only authorized a potential sale rather than mandating its consummation. The ICC's order provided only SIRY the option of canceling the sale; if SIRY wished to consummate the sale, SIRC was bound to comply.[6] In addition, even if the order can

[6] The ICC, as an intervenor in this action, takes the position that § 10905 does not permit the seller to back out of the sale once the transaction has reached this stage. We agree. We find no support for RLEA's assertion that SIRC simply could withdraw its abandonment application and continue to operate its line. In the first place, the ICC would have to approve such a withdrawal—a very slight possibility considering its position before this court. In addition, nowhere in § 10905 is there any provision for the abandoning party to withdraw its application at this stage.

be considered noncoercive, the fact of the matter is that the *authorized* sale was completed prior to the commencement of RLEA's action. If the district court were to require a return to the presale status quo at this point, it nonetheless would be required to modify the ICC's directive giving SIRC and SIRY immediate authorization to consummate the sale. Such a remedy is unavailable in the district court.

We further reject RLEA's suggestion that the district court could have provided injunctive relief by ordering SIRC to maintain the employment status of its employees during negotiations while at the same time permitting the sale to stand. We agree with the district court that "[s]imply to order SIRC to continue paying the employees without furnishing rail services is not authorized under the RLA because the RLA's purpose is to provide for maintenance of the status quo only to ensure the continued furnishing of railroad services." *Railway Labor Executives' Association v. Staten Island Railroad Corporation,* No. 85-1532, slip op. at 12 (E.D. N.Y. May 21, 1985).

III. CONCLUSION

For the reasons set forth above, the judgment dismissing RLEA's complaint is modified to declare that the dismissal is with prejudice, under Rule 12(b)(6), and, as modified, affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-85-1532

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Plaintiff,

-against-

STATEN ISLAND RAILROAD CORPORATION and
STATEN ISLAND RAILWAY CORPORATION,
Defendants.

MEMORANDUM AND ORDER

[Entered May 23, 1985]

SIFTON, District Judge.

On April 25, 1985, plaintiff, Railway Labor Executives' Association ("RLEA"), brought this action against defendants, Staten Island Railroad Corporation ("SIRC") and Staten Island Railway Corporation ("SIRY"), alleging that defendant SIRC, by entering into an agreement with defendant SIRY under Interstate Commerce Act ("ICA") Section 10905, 49 U.S.C. § 10905, to sell SIRC's entire railroad line without accompanying employee protections, violated the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.* More specifically, RLEA alleges that SIRC's conduct constitutes a change of the existing rates of pay, rules or working conditions of its employees as embodied in the collective bargaining agreement, in violation of Section 2, First, and Section 6 of the RLA, 45 U.S.C. § 152, First, and 156.

On April 25, 1985, plaintiff sought a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, to enjoin this conduct. On May 2, 1985, defendants cross moved

for dismissal pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim, respectively.

Argument on all motions was held on May 6, 1985. For the reasons stated below and after reviewing the record in this case and the various submissions of the parties and considering arguments of counsel, defendants' motions for dismissal are granted, and plaintiff's application for preliminary injunctive relief is necessarily denied. The allegations of the complaint and undisputed allegations in the papers presented on these motions establish the following.

Defendant SIRC is a New York corporation. Until an Interstate Commerce Commission ("ICC") order dated April 24, 1985, was issued ordering the sale of its railroad lines to defendant SIRY, SIRC was a common carrier by railroad providing freight service over 31.16 miles of track in New York and New Jersey, primarily for chemical and food products. SIRC is a wholly-owned subsidiary of the Maryland and West Virginia Company which in turn is a wholly owned subsidiary of the Baltimore and Ohio Railroad Company ("B&O"). The B&O is one of the Chessie Systems Railroads. SIRC employed 31 people, excluding executive corporate officers and management employees, all of whom were represented by collective bargaining representatives.

Defendant SIRY is the purchaser of SIRC's railroad lines. It is a newly formed, wholly owned subsidiary of the New York Susquehanna and Western Railway Corporation ("NYS&W") which in turn is a wholly owned subsidiary of the Delaware Otsego Corporation ("DOC").

Plaintiff RLEA is an association of the executive officers of twenty-one national labor organizations which represents virtually all of the country's organized railroad employees, including all of the ten unions which represent various classes and crafts of SIRC's 31 unionized employees.

Twelve SIRC employees were covered by labor protective provisions already existing in their collective bargaining agreements, which guarantee protective payments upon their em-

ployer's abandonment or cessation of operations in the amount of 60% (in one instance, 100%) of their current wages for up to five years.

On November 30, 1984, SIRC served on the ICC a notice of intent to abandon its lines, a prerequisite to filing an abandonment application, 49 C.F.R. § 1152.20. As further required by the ICC's regulation, SIRC's notice of intent to abandon was posted on its property, served on RLEA, and published in two newspapers of general circulation.

On December 24, 1984, SIRC filed an application with the ICC pursuant to 42 [sic] U.S.C. § 10903 for authorization to abandon and discontinue service over its entire line of railroad, involving 16.68 miles of its own lines and trackage rights over 14.48 miles of Staten Island Rapid Transit Operating Authority ("SIRTOA") lines. SIRC's application indicated that it had been highly unprofitable over the years, resulting in accumulated SIRC deficits of approximately $28.4 million and that assets dedicated to operation of the lines could be better utilized elsewhere. SIRC also stated that it was negotiating for the sale and lease of the entire line to the DOC. Various parties, including the City of New York, the President of the Borough of Staten Island, and the Staten Island Committee for Revitalization and Growth of Commerce, Industry and Governmental Services, filed comments in support of the proposed abandonment and discontinuance. The RLEA and Brotherhood of Locomotive Engineers ("BLE") filed comments with the ICC opposing the application and seeking imposition of employee protective conditions in the event that the ICC approved the proposed line abandonment.

On February 7, 1985, the ICC issued a certificate and decision authorizing SIRC to abandon its 16.68 mile line and to discontinue service over the 14.48 miles of sIRTOA [sic] lines over which it held trackage rights. The ICC, however, found that the SIRC application involved only a partial abandonment and that SIRC's parent corporations would benefit from the proposed abandonment and had sufficient financial resources to cover the cost of employee protection. Therefore, the ICC conditioned its approval of SIRC's abandonment and dis-

continuance application upon compliance with the so-called *Oregon Short Line* protection provisions—100% salary payment for six years. Also on February 7, 1985, the ICC published notice of its findings in the Federal Register and specified that any offer of financial assistance under section 10905 had to be submitted within ten days. *See* 49 U.S.C. § 10904.

On February 15, 1985, NYS&W filed an offer to purchase SIRC's lines subject to the proposed abandonment for @ [sic] 3.3 million under the financial assistance procedures of 49 U.S.C. § 10905. NYS&W's proposal stated that rail service over the line would be provided by SIRY.

By decision served February 22, 1985, the ICC found NYS&W's offer to be bonafide and reasonable. Consequently, the Commission postponed the effectiveness of the abandonment certificate in accordance with the forced sale provision of § 10905. However, the ICC found that the financial assistance procedures of § 10905 could not be used to acquire the trackage rights over the SIRTOA line. By its order, the ICC established March 8, 1985, as the latest date by which the parties were to reach a negotiated agreement for the proposed transaction.

By letter dated February 26, 1985, SIRC withdrew that portion of its application requesting discontinuance of its trackage rights over the SIRTOA line. The ICC subsequently granted the withdrawal.

During the pendency of SIRC's abandonment petition before the ICC, four member labor unions in RLEA representing 11 of SIRC's 31 employees served "Section 6" [1] notices on SIRC. Accompanying the notices were cover letters which stated, in pertinent part:

> "We have been informed that the [SIRC] has filed, or is about to file, an application with the [ICC] for authority . . . to abandon its operations . . . . We trust that if the ICC should grant the carrier's request for

[1] Under Section 6 of the RLA, a party to a collective bargaining agreement desiring a change in the terms of the agreement must serve written notice of a desired change on the other party to the agreement.

> abandonment authority, the SIRC will not exercise that authority until it has first complied with the procedures of Section 6 of the [RLA] to negotiate the changes which an abandonment of operations would cause in the rates of pay, rules, and working conditions of those SIRC employees who are represented by this Organization . . . .
>
> In order to provide definitive protection for the interests of employees as well as to enable the SIR [sic] to effectuate its plans, this Organization hereby serves the SIRC under Section 6 of the RLA, the attached proposed agreement which we request that SIRC enter into as the means for protecting the interests of our members which might be affected by an abandonment, sale or transfer of the lines, property or stock or operating authority of the SIRC."

The Section 6 notices proposed that the SIRC amend its existing collective bargaining agreement to provide (1) that SIRC will not abandon lines, discontinue or cease all or any portion of its operations, or sell, lease or transfer all or a substantial portion of its lines, property, stock or operations except after giving the organization six months advance notice, and either (2) that the SIRC would apply the *Oregon Short Line* conditions to all of its employees who may be affected by an abandonment, discontinuance, sale, transfer, etc. of its lines, or (3) that if SIRC enters into any sale, lease or transfer of its lines, then SIRC would require the purchaser to (a) employ SIRC's employees, (b) assume the organization's collective bargaining agreement with the SIRC, and (c) apply the "New York Dock" labor protective provisions to all employees represented by the organization who might be affected by the transfer.

The RLEA submitted comments to the ICC on March 1, 1985, urging that the Commission impose *Oregon Short Line* labor protective conditions if the Commission were to authorize and mandate the sale of SIRC's lines to SIRY under § 10905. Also during March 1985, SIRC and NYS&W reached agreement on the terms and conditions of the proposed transaction.

The agreement provided that SIRY would acquire and operate SIRC's lines subject to various terms and conditions, inter alia, that SIRY would pay SIRC the cash equivalent of $2.3 million; that SIRY would require to conduct their railroad operations; that SIRC's petition to abandon would be dismissed along with the employee protections previously imposed by the Commission as a condition of abandonment; that the employee protections requested by the RLEA would be denied; and that the parties would be exempt from the Section 6 notices. SIRC and SIRY notified the ICC of their negotiated agreement prior to the March 18, 1985 deadline imposed by the ICC.

On April 24, 1985, the ICC issued an order approving and mandating the proposed transactions between SIRC and SIRY and dismissing SIRC's abandonment application pursuant to § 10905. The order did not impose labor protective provisions and made no mention of Section 6 of the RLA. The same day, SIRC and SIRY consummated the sale of the railroad lines.

DISCUSSION

The threshold inquiry is whether is whether [sic] this Court has subject matter jurisdiction. *NYU v. National Labor Relations Board,* 364 F. Supp. 160 (S.D.N.Y. 1973). Plaintiff RLEA seeks declaratory and injunctive relief claiming jurisdiction exists under 28 U.S.C. §§ 1331, 1337, 2201 and 2202. Defendant SIRC and SIRY contend in their motions to dismiss that this Court lacks jurisdiction to consider plaintiff's requests for relief because these claims, though couched in terms of RLA violations, are in essence a collateral attack upon the ICC order.

The statutory provision governing judicial review of ICC actions in 28 U.S.C. § 2321, which provides in pertinent part:[2]

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[2] Section 2321 contains certain narrow exceptions to judicial review of final ICC orders in the courts of appeals, which are prescribed in 28 U.S.C. § 1336(a). Section 1336(a) gives the district courts jurisdiction to enforce or enjoin "any order of the [ICC] for the payment of money or the collection of fines, penalties, and forfeitures." These exceptions are not applicable to the instant case. For a thorough discussion of the historical evolution of the divided scheme of review for ICC orders, *see Field Container Corp. v. ICC,* 712 F.2d 250, 253-54 (7th Cir. 1983) (Posner, J.).

> "(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in Chapter 158 of the title."

Chapter 158 at 28 U.S.C. § 2342 provides in pertinent part:

> "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> . . . .
>
> "(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 . . . ."

It is well established that "a special statute vesting jurisdiction in a particular court cuts off the jurisdiction other courts might otherwise have under a more general standard." *Assure Competitive Transport, Inc. v. United States,* 629 F.2d 467, 471 (7th Cir. 1980); *see, e.g., Whitney National Bank of New Orleans,* 379 H.S. [sic] 411 (1965); *Coca-Cola Co. v. FTC,* 475 F.2d 299, 302 (5th Cir.), *cert. denied,* 414 U.S. 877 (1973); *ITT v. Vancap Ltd.,* 519 F.2d 1001, 1015 (2d Cir. 1975). In the present case, sections 2321(a) and 2342(5) vest judicial review of ICC actions exclusively in the courts of appeals, thereby cutting off the general grounds of jurisdiction asserted by plaintiff. *See Alabama Electric Cooperative, Inc. v. United States,* 574 F. Supp. 27, 30 (M.D. Ala. N.D. 1983). As stated in *Denberg v. United States,* 696 F.2d 1193, 1196 (7th Cir. 1983), in which the Seventh Circuit held that it rather than the district court had jurisdiction over an action challenging a decision of the Railroad Retirement Board,

> "[c]onfining judicial review to the courts of appeals is not some mindless, irksome technicality that we should try to construe our way around. It is the use of the district courts to review administrative action that does not make sense when there is review

> jurisdiction in the court of appeals. Not only are the district courts trial, rather than review, courts, but to allow someone seeking judicial review of administration action to get that review in the district court with a right to appeal to the court of appeals is to give him two judicial reviews of administrative action."

In the present case, however, plaintiff RLEA insists that it is not challenging the ICC's order but rather is only asserting an independent cause of action arising out of the mandatory negotiating and status quo requirements of the RLA. This argument is unpersuasive. As more fully explicated below, the Court could not enter an order granting any of the relief requested by the RLEA without having the improper effect of reversing or modifying the ICC order.

Plaintiff RLEA seeks a bargaining order and preservation of the pre-sale status quo. As against the seller-railroad SIRC, then, the RLEA requests relief which would order SIRC to resume railroad operations and return the furloughed employees of the various unions to their prior work under the conditions and terms set forth in their respective collective bargaining agreements. In seeking such relief, the RLEA asks the Court for relief that it cannot provide. There is no meaningful status quo order that the Court could enter against SIRC that would not involve SIRC's resumption and continued provision of railroad services. Simply to order SIRC to continue paying the employees without furnishing rail services is not authorized under the RLA because the RLA's purpose is to provide for maintenance of the status quo only to ensure the continued furnishing of railroad services. An order mandating the resumption of railroad services by SIRC would reverse the ICC order mandating the sale by SIRC of its rail lines to SIRY—a sale which, when consummated, terminated SIRC's authority to conduct rail operations. As against the buyer-railroad SIRY, the RLA [sic] concedes that imposition of employee protective provisions or status quo re-employment of the furloughed employees would overturn the ICC order which

approved the sale to SIRY without imposing any such conditions.[3] The conclusion that necessarily results from the fact that the Court can structure no relief for plaintiff without in practical terms altering the ICC order is that plaintiff has initiated a collateral attack upon the ICC's order. Plaintiff's action is

> "essentially one to annul or set aside the order of the [ICC]. While the [complaint] does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant [companies] be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside."

Venne v. Michigan Central Railroad, 271 U.S. 127, 130 (1926); *see also Alabama Electric Cooperative, Inc., supra* at 30.

Such collateral attacks upon administrative orders are, as noted, not permitted. *Myers v. Bethlehem Steel Shipbuilding Corp.,* 330 U.S. 41, 48-50 (1938); *Gaunce v. deVincentis,* 708 F.2d 1290, 1292-93 (7th Cir.), *cert. denied,* ____U.S.____, 104 S. Ct. 417 (1983); *Robinson v. Dow,* 522 F.2d 855, 858 (6th Cir. 1975); *Oling v. Air Line Pilots Association,* 346 F.2d 270 (7th Cir.), *cert. denied,* 382 U.S. 926 (1965). In *Oling,* the plaintiffs, airline flight engineers, sought injunctive relief against the collective bargaining representative and their employer alleging violations of the RLA resulting from a merger approved by the Civil Aeronautics Board ("CAB"). Although plaintiffs had a statutory right to seek review of the order in the courts of appeals, they chose instead to bring suit in the district court. They asserted that their claims were broader than and different from any claims they had asserted before the CAB.

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[3] Plaintiff contends that SIRY is an indispensable party under Rule 19. This characterization of SIRY only underlines the fact that the attack here is on the ICC order of which SIRY is the beneficiary. SIRY, which was not a carrier involved in rail operations until after approval of the sale by the ICC which prior to approval was not subject to the RLA and which has never entered into any collective bargaining agreement with any of the unionized employees subject of this action, is an anamolous defendant in plaintiff's RLA action.

Plaintiffs in *Oling* based their claims on the RLA and asserted that the CAB had not had jurisdiction over their claims. Further, they asserted that injunctive relief, if ordered by the district court, would not overturn the CAB order. The Seventh Circuit affirmed the district court's dismissal for lack of jurisdiction noting that, even though some of plaintiffs' allegations were not earlier presented to the CAB, "in essence they are the same, although in some instances couched in different phraseology." *Id.* at 277. Similarly in the present case, plaintiff petitioned the ICC for labor protective provisions as a condition of the Commission's approval of the proposed sale by SIRC to SIRY. The ICC in approving the sale, however, did not impose any conditions in keeping with its construction of the RLA as requiring that no employee protective provisions be imposed in a section 10905 "forced sale" transaction. *See Illinois Central Gulf Railroad Co.—Abandonment—In Alexandria County, Ill.,* 366 I.C.C. 911 (1983), *aff'd sub nom. Simmons v. Interstate Commerce Commission,* No. 83-1474 (7th Cir. March 15, 1985). Although plaintiff RLEA couches its claims in terms of RLA violations, it seeks the same relief urged unsuccessfully directly upon petition to the ICC. Plaintiff's only response to this reality is that "the RLEA, unlike the plaintiffs in *Oling,* is not challenging the ICC's order authorizing SIRY's acquisition of the SIRC line." That argument, however, begs the question. As stated in *B.F. Goodrich Co. v. Northwest Industries, Inc.,* 424 F.2d 1349, 1353-54 (3d Cir.), *cert. denied,* 400 U.S. 822 (1970), "the statutory procedure for review [of ICC orders] is applicable although an order is not directly attacked—so long as the practical effect of a successful suit could contradict or countermand a Commission order." *Id.* (citations omitted).

At least two other cases in which district court jurisdiction has been held not to exist because of exclusive court of appeals jurisdiction have concerned collateral attacks on ICC orders. In *Alabama Electric Cooperative, supra,* plaintiffs sought declaratory relief regarding the validity of ICC and Alabama Public Service Commission decisions affecting commercial railway traffic and the constitutionality of various provisons of the Staggers Rail Act of 1980. The court granted defendants' motions to dismiss holding that the statutory scheme vesting

judicial review of ICC actions in the courts of appeals exclusively cut off any jurisdiction the district court might otherwise have had to review regulatory decisions of the ICC. *Id.* at 30-31.

In *State of Minnesota v. O'Neal,* 472 F. Supp. 905 (D. Minn. 3d Div. 1979), plaintiff brought an action to permanently enjoin the ICC from initiating further proceedings in certain pending railroad abandonment matters until an environmental impact statement had been prepared by the Commission. On motion to dismiss, the district court held that it lacked jurisdiction because plaintiff had failed to exhaust administrative remedies and because, even if judicial review were available, it would be exclusively in the court of appeals. The court observed that "where exclusive jurisdiction is mandated by statute, as it is here, plaintiff cannot bypass the procedure which Congress has provided by labeling its requested relief "mandamus." *Id.* at 908. In the present case, the RLEA, by labeling its claim an RLA action, similarly attempts to bypass the statutory scheme of judicial review.

For the foregoing reasons, defendants' motions for dismissal pursuant to Rule 12(b)(1) are granted, and plaintiff [sic] motion for a preliminary injunction is denied.

The clerk is directed to enter judgment dismissing the complaint and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York

May 21, 1985

CHARLES P. SIFTON

United States District Judge

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-231

THE STATEN ISLAND RAILROAD CORPORATION-ABANDONMENT AND DISCONTINUANCE OF SERVICE-IN RICHMOND COUNTY, NY AND UNION COUNTY, NJ

In The Matter of an Offer of Financial Assistance

Decided: April 19, 1985
Served: April 24, 1985

By decision served February 7, 1985, applicant was authorized to abandon its 16.68-mile line of railroad between St. George (milepost 0.00) and Cranford Junction (milepost 12.09); between Port Ivory (milepost 0.00) and the end of the line near Howland Hook (milepost 0.94); and between Arlington Yard (milepost 0.00) and the end of the line at or near Travis (milepost 3.65); and to discontinue service over 14.48 miles of line of the Staten Island Rapid Transit Operating Authority between St. George (milepost 0.00) and Tottenville (milepost 14.48). A timely offer of financial assistance to acquire the 16.68 mile line was filed by The New York, Susquehanna and Western Railway Corporation (NYSW).[1] Subsequently, NYSW substituted its corporate affiliate, The Staten Island Railway Corporation (SIRY) as the purchasing party.

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[1] NYSW had offered to acquire both the 16.68 mile line and trackage rights over the 14.48 mile portion. By decision served February 22, 1985, I determined that a party cannot use the offer of financial assistance procedures at 49 U.S.C. 10905 to acquire trackage rights. Accordingly, review of the offer was limited the [sic] 16.68 mile line owned by applicant. By decision served March 5, 1985, the application was dismissed to the extent it sought discontinuance of trackage rights over the 14.48 mile line.

Since it was determined that the offer to purchase the 16.68 mile line was *bona fide,* issuance of a certificate authorizing abandonment was delayed and the parties were given time to negotiate the sale of the line. The parties have notified the Commission that they reached an agreement.

Under 49 U.S.C. 10905(e), if a carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission must approve the transaction and dismiss the application for abandonment and discontinuance. Applicant must complete the sale so long as the buyer consummates. Accordingly, the application to abandon the 16.68 mile line is dismissed, and transfer of that property to the offeror will be authorized.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. Under 49 U.S.C. 10905(e), the offeror is authorized to acquire the 16.68 mile line.

2. Under 49 U.S.C. 10905(e), the application to abandon the 16.68 mile line is dismissed effective on consummation of the sale.

3. This decision is effective on the date of service.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

JAMES H. BAYNE
Secretary

(SEAL)

APPENDIX D

STATUTES RELIED UPON

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

- A. Section 2, First, 45 U.S.C. § 152, First
- B. Section 2, Seventh, 45 U.S.C. § 152, Seventh
- C. Section 5, First, 45 U.S.C. § 155, First
- D. Section 6, 45 U.S.C. § 156

II. Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* (Excerpts)

- A. Section 10905, 49 U.S.C. § 10905

III. 28 U.S.C. § 2321

IV. 28 U.S.C. § 2342

I. Railway Labor Act, 45 U.S.C. § 151, *et seq.* (Excerpts)

A. Section 2, First

45 U.S.C. § 152, First

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

B. Section 2, Seventh

45 U.S.C. § 152, Seventh

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * *

C. Section 5, First

45 U.S.C. § 155, First

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

D. Section 6

45 U.S.C. § 156

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act by the

Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

II. Interstate Commerce Act, 49 U.S.C. §10101 *et seq.* Section 10905, 49 U.S.C. § 10905

A. Section 10905.

49 U.S.C. § 10905

(a) In this section—

(1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Commission—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f)(1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail trans-

portation, plus a reasonable return on the value of the line; and

(C) Where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

III. 28 U.S.C. § 2321

§ 2321. Judicial review of Commission's orders and decisions; procedure generally; process

(a) Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

(b) The procedure in the district courts in actions to enforce, in whole or in part, any order of the Interstate Commerce Commission other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

(c) The orders, writs, and process of the district courts may, in the cases specified in subsection (b) and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49, run, be served and be returnable anywhere in the United States.

IV. 28 USCS § 2342

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11901(j)(2) of title 49, United States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

APPENDIX E

Railway Labor Executives' Association Member Organizations

American Railway Supervisors Association, (Division of BRAC;
American Train Dispatchers' Association;
* Brotherhood of Locomotive Engineers;
* Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
* Brotherhood of Railway, Airline and Steamship Clerks;
* Brotherhood Railway Carmen of the United States and Canada (Division of BRAC);
Hotel Employees and Restaurant Employees International Union;
* International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers and Blacksmiths;
* International Brotherhood of Electrical Workers;
International Brotherhood of Firemen and Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
* Railroad Yardmasters of America (Division of UTU);
Seafarers International Union of North America;
* Sheet Metal Workers' International Association;
Transport Workers Union of America; and
* United Transportation Union.

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* Those organizations marked by an asterisk represent employees on respondent SIRC. *See*, Joint Appendix at 93.